UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

LABOR PLUS, LLC, AND ITS SUCCESSOR
WYNN LAS VEGAS, LLC

and **Case 28-CA-161779**

WYNN LAS VEGAS, LLC

and **Case 28-CA-166890**

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
AND MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES AND CANADA
LOCAL UNION 720 (IATSE)

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DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in Las Vegas, Nevada, on November 3, 2016, based upon charges filed by the International

Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada Local Union 720 ("Union" or "IATSE Local 720") and an Order consolidating cases, consolidated complaint and notice of hearing dated August 31, 2016 ("complaint") issued by the Regional Director for Region 28 on behalf of the General Counsel. The complaint alleges that Wynn Las Vegas, L.L.C. ("Respondent" or "Wynn"), violated Section 8(a)(1) and (5) of the National Labor Relations Act ("Act") by: (1) refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of a unit of stagehands employed by Wynn; refusing to provide the Union with necessary and relevant information regarding unit employees; and refusing to bargain with the Union about a decision to subcontract unit work, or the effects of that decision. According to the complaint, Wynn's bargaining obligation is premised upon it being a successor employer to Labor Plus L.L.C. (Labor Plus), the company that previously employed the stagehands.[1]

At the hearing, the General Counsel called three witnesses to testify. Along with this witness testimony, the parties rely extensively on a 30 paragraph stipulation of facts and associated exhibits that were admitted into evidence.[2] (JX. 1–20) Based upon the entire record, including the stipulation of facts, my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Wynn, I make the following findings of fact and conclusions of law.

I. Jurisdiction and Labor Organization

Respondent admits that it is a Nevada limited liability company, conducting operations in the lodging, gaming, and entertainment industry in Las Vegas, Nevada. It further admits that it derives gross revenues in excess of $500,000 annually, and purchases and receives at its Las Vegas facility goods valued in excess of $50,000 directly from points outside the State of Nevada. Wynn admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. *Wynn Las Vegas, LLC,* 358 NLRB 690, 691 (2012) (Board finding jurisdiction). Although not admitted by Respondent, I find that IATSE Local 720 is a labor organization within the meaning of Section 2(5) of the Act. *Stage Employees IATSE Local 720 (AVW Audio Visuals)*, 332 NLRB 1, 5 (2000) (finding that IATSE Local 720 is a labor organization); *Bellagio, LLC*, 359 NLRB 1116 (2013) (directing a second election for employees to determine whether they desire to be represented by IATSE Local 720).

II. Facts

A. Background

Respondent operates a luxury hotel and casino located on the Las Vegas "strip." *See,*

[1] The complaint originally alleged, in Case 28–CA–166571, that Labor Plus also violated Sec. 8(a)(1) and (5) of the Act. At the hearing, I granted the General Counsel's motion to amend the complaint by removing allegations that Labor Plus violated the Act, remove all references to Case 28–CA–166571, and amending the caption accordingly. Thus the complaint, as amended, only alleges that Wynn violated the Act. (Tr. 19; GC 1(v))

[2] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Joint, and Administrative Law Judge Exhibits, are denoted by "GC." "JX." and "ALJ." respectively.

e.g., *Wynn Las Vegas, LLC*, 358 NLRB 674, 678 (2012).[3] Along with a hotel and casino, Wynn also operates two theaters on its property—the Aqua and the Encore. The Aqua Theater hosts the show Le Rève. Since about October of 2014 the Encore Theater has been home to a musical revue called "ShowStoppers."[4] ShowStoppers showcases classic songs from American theater—the "best of the best." (Tr. 86–88, 108, 115)

Monica Marie Coakley is the assistant director of technical operations for ShowStoppers, and has held that position since October 2014. Coakley assigns work to the stagehands working in the Encore Theater who perform the various rigging, props, carpentry, electrical, lighting, and related work needed to produce the show.[5] (Tr. 75–76, 104–106, 110–111, 115; JX. 5; GC. 21)

In November 2014, Wynn signed a contract for Labor Plus to provide stagehands for ShowStoppers.[6] The agreement called for Labor Plus to provide "non-union labor" throughout the run of the show, unless cancelled by either party.[7] Even though the stagehands were technically employed by Labor Plus, the company did little more than pay their wages. Coakley directed the Labor Plus stagehands, assigned their work, and supervised their day-to-day tasks. She also tracked their hours and then forwarded them to Labor Plus for payment. (Tr. 43, 49, 80–81, 87, 94–95; GC. 21(a)-(j); JX. 1; JX 7 p. 133; JX 20)

Along with using contract stagehands, Wynn employed three of its own stagehands for ShowStoppers. Coakley testified that 16 stagehands are needed to produce the show—including both Wynn and Labor Plus stagehands. She considers a full complement for the show to be 16 full-time stagehands and six steady-extras.[8] Steady-extras are fill-in workers who step in whenever a full-time stagehand is unavailable to work. They are an important part of the employee mix and need to be ready to cover the cues for the show whenever called upon. Because of turnover, the only time Coakley has had a full complement of 22 available stagehands was for about one month in December 2015. (Tr. 89, 121–122; GC. 21(a); JX. 20)

On April 15, 2015,[9] the Union filed a representation petition in Case 28–RC–150168 for a unit of Labor Plus stagehands working at the Encore Theater.[10] The parties signed a stipulated election agreement, scheduling the election for May 2.[11] Before the election, Labor Plus submitted a voter eligibility list with 19 stagehands (14 full-time employees and 5 steady-extras).

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[3] The "Las Vegas strip" encompasses "the four mile area of Las Vegas Boulevard on which many of the city's most famous casinos and resorts are located." *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1116, fn. 1 (D. Nev. 1999).

[4] The Encore Theater is also referred to as the ShowStoppers Theater. (Tr. 87)

[5] Throughout this decision, the term "stagehands" excludes wardrobe, hair, and makeup employees.

[6] Before Labor Plus, Wynn was using contract stagehands from a company called Showpay. (Tr. 131–132, 137, 145)

[7] The General Counsel does not allege that the contract's "non-union labor" provision is a violation of the Act. *Compare David Saxe Productions*, 364 NLRB No. 100, slip op. at 2, 18 (2016) (violation for maintaining a "non-union" provision in employment agreement requiring employees to acknowledge their employment is not under the jurisdiction of any labor organization).

[8] Steady extras are also referred to as "swing" employees. (Tr. 88)

[9] All dates are in 2015 unless otherwise noted.

[10] Wynn was not named in the petition, and was not involved in the representation election process. (JX. 11, 14)

[11] The stipulated unit includes full-time and part-time stagehands working in the Encore Theater, excluding guards, supervisors, wardrobe, hair, and makeup employees.

It also listed two "casual" employees that the parties stipulated would vote subject to challenge.[12] (JX. 2, 4, 5, 20)

Two days after the petition was filed, on April 17, Wynn informed Labor Plus that it was terminating its contract and bringing the stagehand work for ShowStoppers "in house," using exclusively Wynn employees.[13] At the same time, Wynn notified the Labor Plus stagehands that they could apply to work directly for Wynn. Labor Plus continued providing stagehands to Wynn through May 9, as Wynn was hiring its own workers and beginning to operate the show using exclusively Wynn stagehands. (JX. 3, 6(b), 14 p.9; 20; GC. 21; Tr. 90–91, 127)

There was no hiatus in the show as it transitioned from using Labor Plus stagehands to using exclusively Wynn stagehands.[14] When they were hired by Wynn, the former Labor Plus stagehands received a pay increase, along with fringe benefits after 90 days of employment. However, their job duties remained the same, and Coakley continued giving them their assignments. The day-to-day work for the stagehands, along with the cue tracks they needed to perform, remained the same after the transition. Once a stagehand was hired directly by Wynn, they were no longer assigned to work at the Encore Theater by Labor Plus. (Tr. 79, 92–95, 109, 132–133, 141–142)

B. The May 2 election and the R-Case litigation

Sixteen people voted during the May 2 election. Labor Plus challenged every voter and also filed post-hearing objections. On August 10, a hearing officer resolved the ballot challenges and election objections.[15] The hearing officer found that 10 employees were eligible to vote, as the evidence showed they were still working at the Encore Theater for Labor Plus as of May 2.[16] The hearing officer found that three voters were not eligible to vote because they had been hired by Wynn before the election, and thus were no longer employed by Labor Plus as of May 2.[17] In doing so, she credited the testimony of Labor Plus Office Manager Rita Taratko that these workers were hired by Wynn on May 1, and that none had been referred to the Encore Theater by Labor Plus after April 30. (JX. 11, 14, 20)

As for steady-extra stagehand David Weigant, the hearing officer found Taratko's testimony that Weigant was hired by Wynn on May 1 as "too unreliable to be credited." Therefore, she ordered that his ballot be counted, finding there was insufficient evidence to show Weigant was no longer employed by Labor Plus in the petitioned-for unit as of the May 2 election. She similarly found that two other voters, Douglas Tate and Chris Portzer, were also

[12] One casual employee voted in the election. (JX. 10, 14) Ultimately it was ordered that his ballot would not be opened or counted, as there was insufficient evidence to reach a determination as to his eligibility to vote. (JX 14)
[13] There is no allegation that Wynn's cancelling the Labor Plus contract was unlawfully motivated.
[14] As Coakley confirmed, "the show must go on." (Tr. 94)
[15] Labor Plus also filed a motion to dismiss the petition claiming the unit had ceased to exist. (JX. 8) The objections and motion to dismiss were dismissed by the Board. *See, Labor Plus, LLC*, 2015 WL 6865885 (Nov. 9, 2015) (unpublished order) (affirming Regional Director's decision dismissing objections); *Labor Plus, LLC*, 2015 WL 6865886 (Nov. 9, 2015) (unpublished order) (affirming Regional Director's decision denying motion to dismiss).
[16] The 10 employees were: Trent Utterback, Kendall Zobrist, Eric Shafer, Bret Portzer, Brian Pomeroy, Eric Fouts, Hector Lugo, Eric Meyers, Luke Cresson, Debbie Jenson-Miller.
[17] The ineligible voters were: James Herlihy, William Stephenson, and Heather Lewis.

eligible to vote. (JX. 11)

Labor Plus filed exceptions to the hearing officer's decision. The Regional Director agreed with the hearing officer's recommendations concerning the challenged ballots, with only one exception involving Portzer, who was a casual employee.[18] Concerning Weigant, affirming the decision that his ballot should be counted, the Regional Director found that Labor Plus did not meet its burden to show that he was not eligible to vote in the election. In sum, the Regional Director ordered that the ballots of the following 12 employees be counted: Trent Utterback, Kendall Zobrist, Eric Shafer, Bret Portzer, Brian Pomeroy, Eric Fouts, Hector Lugo, Eric Meyers, Luke Cresson, Debbie Jenson-Miller, David Weigant, and Douglas Tate. (JX 14) Labor Plus sought review with the Board, which denied the request. *Labor Plus, LLC*, 2015 WL 6865885 (Nov. 9, 2015) (unpublished order).

The 12 ballots were opened and counted, and on November 18 a tally of ballots issued showing a 12-0 vote for the Union. The Board issued its Certification of Representative on December 1. (GC. 23; JX. 15)

C. The Union's request to bargain

While the election litigation was pending, on June 26 the Union sent a letter to both Labor Plus and Wynn demanding bargaining and requesting certain information to prepare for bargaining. The letter also warned both companies not to make any unilateral changes or discipline employees without first bargaining with the Union. Wynn replied on July 2, questioning the Union's position regarding the company's bargaining obligation, and asking the Union for the factual and legal basis for its assertions in order to further assess the Union's bargaining demand.[19] Labor Plus did not reply to the Union's letter. (JX. 12; 13; 20)

D. The Frank Sinatra birthday celebration

Four weeks a year the Encore Theater is "dark." During these weeks ShowStoppers is not scheduled to perform and Wynn usually conducts maintenance and other routine work that cannot be accomplished while the show is performing. One of the scheduled dark weeks was November 20 to December 7. However, on December 2 Wynn had scheduled a concert celebrating the 100th birthday of Frank Sinatra to play in the Encore Theater.[20] The show, a Grammy all-star concert, brought together various celebrities including Tony Bennett to celebrate what would have been Frank Sinatra's centennial birthday. The concert was scheduled to be taped for broadcast on CBS. Therefore, the theater's bandstand, along with some theater

[18] The Regional Director found the parties had agreed Portzer would vote subject to challenge. Because the record evidence was insufficient to decide Portzer's eligibility, the Director ordered that his status would not be resolved unless his ballot was determinative. (JX. 14.) Ultimately, it was not.

[19] The General Counsel asserts that Wynn did not provide the requested information. (GC Br. at 6) However, neither the evidence introduced at trial nor the stipulation of facts definitively shows this to be the case. At most, Wynn's July 2 letter only shows that the information was not provided on that date. (JX. 13) Because of my findings, it is unnecessary to reach the issue as to whether the record is sufficient to prove this allegation.

[20] On November 5, Wynn entered into an agreement with AEG Ventures, LLC for the Frank Sinatra Show. Wynn was to provide the stage production for the concert, while AEG, the show's producer, was responsible for the performance itself, including related expenses. (GC. 22)

seats, needed to be reconfigured for the concert. Wynn stagehands, along with other non-Wynn employees, performed the work preparing for the show.[21] This included hanging signs, storing extra props, and adjusting the seats and the bandstand. Also, television camera platforms needed to be built in the theater to allow for the taping. These platforms were not built by Wynn stagehands, notwithstanding the fact that some had the requisite skills to do so. The General Counsel alleges that the stagehand work associated with the Frank Sinatra show constitutes a mandatory subject of bargaining, and that Wynn failed to bargain with the Union regarding this work. Wynn denies this allegation.[22] (GC. 1(g), 1(j); GC. 22; Tr. 96–98, 104–106, 129–130)

III. Analysis

A. Legal Standard

A new employer assumes an obligation to bargain with the union representing employees of its predecessor if the new employer is a legal successor to the old employer, and hires a majority of the predecessor's workforce. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–46 (1987); *Empire Janitorial Sales & Service, LLC.,* 364 NLRB No. 138, slip op. at 10–11 (2016). If the new employer is a successor, the Board waits until the successor has hired a "substantial and representative complement" of its work force to determine whether a bargaining obligation exists. *Empire Janitorial Sales & Services, LLC*, 364 NLRB No. 138, slip op. at 11 (*citing Fall River Dyeing*, 482 U.S. at 46–47). At that point, if the work force consists of a majority of the predecessor's workers, then the successor has an obligation to bargain with the union that represented those employees. *Fall River Dyeing*, 482 U.S. at 47.

B. Wynn is a legal successor to Labor Plus

To determine whether a new employer is a legal successor to the previous employer, the Board considers the "totality of the circumstances" to determine whether there is a substantial continuity between the two companies. *Empire Janitorial Sales & Service, LLC.,* 364 NLRB No. 138, slip op. at 10 (2016) (citing *Fall River Dyeing*, 482 U.S. 27, 43 (1987). "Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Fall River Dyeing*, 482 U.S. at 43. In making this analysis "the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job

[21] The Wynn stagehands worked during the dark week to prepare for the Frank Sinatra show, and some worked after December 2 dismantling the show. Work was available to any Wynn stagehand that wanted to work during the dark week. (Tr. 96–99; GC. 24) Either all of the Wynn stagehands or "almost all of them" worked for the preparation of the Frank Sinatra Show. (Tr. 131)

[22] Coakley testified that she was not aware of any bargaining with the Union about the stagehands, and was similarly unaware of any actions taken by Wynn to recognize the Union. However, Coakley testified that she could not speak to the question of whether Wynn recognizes the Union as the bargaining representative of the stagehands, as that is an issue her General Manager and Technical Director deal with, not her. (Tr. 95) I credit Coakley's testimony in this proceeding.

situations as essentially unaltered.'"[23] Id. (quoting *Golden State Bottling, Co. v. NLRB*, 414 U.S. 168, 184 (1973)).

Here, the evidence shows that Wynn is a legal successor to Labor Plus. While Wynn operates a hotel-casino and Labor Plus provides contract labor, the fact they technically have separate businesses is not controlling. Indeed, "[i]t is difficult to imagine a clearer case for the application of the successorship doctrine than the present one, where the change of employer represents the recapture of an operation previously performed by an independent contractor." *NLRB v. Cablevision System Development Co.*, 671 F.2d 737, 739 (2d Cir. 1982), cert. denied, 459 U.S. 906 (1982).

In *Cablevision*, the court rejected the employer's argument that it was not a legal successor when it terminated a subcontract involving the installation and maintenance of cable receiver units and brought the work in-house. The employer argued that, because its overall business was "quite different" from that of the subcontractor, it was not a successor. Id. The *Cablevision* court noted that the relevant comparison is not between the new employer and the previous subcontractor "on a total basis, but between the specific operations involving the union members," which was the installation and maintenance of the company's equipment on Long Island. *Id.,* at 739. The question is whether those operations, as they impinge on union members, remain essentially the same after the transfer to the new employer; the *Cablevision* court found they were the same and that a successorship relationship existed. Id.

Here, the relevant operation affecting Union members is the performance of stagehand work at the Encore Theater. And this work remained essentially the same after Wynn took over employment of the stagehands from Labor Plus. For stagehands, they took assignments from the same supervisor, their job duties and day-to-day work assignments remained the same, as did the cue tracks they needed to perform.[24] Also, the transition from Labor Plus stagehands to Wynn stagehands occurred without a hiatus in operations.[25] As such, I find that after the transition there was a substantial continuity between Wynn and Labor Plus and that Wynn is a legal successor to Labor Plus for the stagehands working at the Encore Theater. *Cablevision System Development Co.*, 671 F.2d at 739.

[23] This is so, because if "employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest." *Fall River Dyeing*, 482 U.S. at 43–44.

[24] Although the stagehands received a wage increase and permanent benefits when they were hired by Wynn, this does not affect the inquiry. *See Van Lear Equipment, Inc.*, 336 NLRB 1059, 1063–1064 (2001) (finding substantial continuity between the predecessor and successor notwithstanding the fact the successor provided a different supervisor, had different pay rates and benefits, and newer buses to drive, as the employees were performing the same work that they performed for the predecessor).

[25] This also supports a finding that there was a substantial continuity between the two companies. *M.S. Management Associates, Inc.*, 325 NLRB 1154, 1155 (1998), enfd., 241 F.3d 207 (2d Cir. 2001) (substantial continuity exists where successor provided the same services, to the same set of customers, with the same equipment and no hiatus in operations).

C. Determining Wynn's bargaining obligation

To decide whether Wynn, as a legal successor to Labor Plus, has an obligation to bargain with the Union, the date upon which Wynn hired a substantial and representative complement of stagehands must first be determined. The Board considers the following factors in establishing the point at which a substantial and representative complement of employees have been hired: whether the job classifications designated for the operation were filled or substantially filled; whether the operation was in normal or substantially normal production; the size of the complement on that date; the time expected to elapse before a substantially larger complement would be at work; and the relative certainty of any expected expansion plans. *Fall River Dyeing,* 482 U.S. at 48; *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1188–1189 (9th Cir. 2011); *Empire Janitorial Sales & Service, LLC.,* 364 NLRB No. 138, slip op. at 10–11 (2016).

Here, Wynn asks the Board to adopt a "full complement" test, by arguing there was no majority when it hired a full complement of stagehands in late 2015. (Wynn Br. at 16) However, the Supreme Court has explicitly rejected this test. *Fall River Dyeing*, 482 U.S. at 50 ("[P]etitioner's full complement proposal must fail."); *Avanti Health Systems*, 661 F.3d at 1189.

The General Counsel asserts that the appropriate trigger date is June 16, arguing that by mid-June most of the job classifications were filled, the workforce was near its normal size, and the production was running normally. (G.C. Br., at 13.) I agree.

As set forth in Appendix A, by June 16 Wynn employed 20 stagehands, including 16 full time employees and four steady-extras. It appears that, as of this date, the job classifications were substantially filled, the show was in normal production, and no other stagehands were hired until early August. As such, I find that a substantial and representative complement of Encore Theater stagehands was hired by June 16.

The next issue is whether Wynn employed a majority of the former Labor Plus employees. *Fall River Dyeing*, 482 U.S. at 41 ("[i]f the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated."). Usually, in successorship cases the bargaining obligation involving the predecessor's employees and the incumbent union has been established before the transition in employers. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 274–275 (1972) (union was certified three months before the transition in employers and had already entered into a collective-bargaining agreement with the predecessor); *Fall River Dying*, 482 U.S. at 31–32 (union was the bargaining representative for a period of about 30 years before the transition); *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 1, 8–10 (2014) (union had been certified since the 1980's when successor employer decided to bring unionized work "in house" in 2003). Thus, there are generally few disagreements as to which of the predecessor's employees should be counted in determining whether a successorship majority exists.

Here, however, the Union's certification did not occur until December 2015, about 7 months after Wynn became the successor employer, and the transition from Labor Plus to Wynn stagehands began even before the representation election had occurred. In these circumstances,

the General Counsel argues that the Board must count all the employees who had ever worked for Labor Plus at the Encore Theater, regardless of whether they were eligible to vote in the representation election, or whether they were employed by Labor Plus on the date of the election. (GC Br., at 11–13.) Because an employer's bargaining obligation attaches as of the date of the union's election victory,[26] the General Counsel's approach would count some Wynn workers as part of a successorship majority even though there was never a bargaining obligation between the Union and Labor Plus regarding those workers.

In support of this novel approach, the General Counsel cites *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448 (10th Cir. 1990); *Stewart Granite Enterprises*, 255 NLRB 569, 570 (1981), and *Nephi Rubber Products Corp.*, 303 NLRB 151 (1991), asserting that, in in these cases, when determining whether a successorship majority existed, the Board counted employees "even if they were not employed by the predecessor immediately prior to the successorship," including employees who had been laid off or retired shortly before the transition. (GC Br., at 11.) However, in each of these cases there was a long-established bargaining obligation between the incumbent union and the predecessor employer going back years, even decades, before the transition to the successor occurred.[27] *Coastal Derby Refining,* 915 F.2d at 1450–1451 (union had represented unit employees for about 40 years before the transition to the successor employer); *Stewart Granite Enterprises*, 255 NLRB 569, 570 fn. 2 (1981) (union represented unit employees for about 9 years before successor purchased operations); *Nephi Rubber Products Corp.*, 303 NLRB 151, 154 (1991), enfd., 976 F.2d 1361 (10th Cir. 1992) (Union had represented manufacturing plant employees for about 13 years before purchase).[28] Thus, there was no question that each employee that was counted towards a successorship majority had been represented by the Union as part of an established bargaining unit with the predecessor.

Therefore, these cases do not support the approach urged by the General Counsel. Instead, they reiterate a principle common in all successorship cases that only those employees who had been represented by the incumbent union at the predecessor employer will be counted in determining whether a successorship majority exists.[29] Here, that means that only those employees who were employed by Labor Plus as of May 2,[30] the date of the representation

[26] "When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain . . . commences not on the date of certification, but as of the date of the election." *Alta Vista Regional Hospital*, 357 NLRB 326, 327 (2011); *Spurlino Materials, LLC v. NLRB*, 645 F.3d 870, 879 (7th Cir. 2011) (employer's bargaining obligation attaches on the date the union is validly elected).

[27] No party has cited any precedent involving a transition from the predecessor to the successor commencing prior to the union's initial representation election.

[28] As for instances cited by the General Counsel where some workers were not employed immediately prior to the successorship, but were counted as part of the successorship majority, these workers were either laid off just before the successorship or were urged by the predecessor to retire for purported preferential treatment. *Coastal Derby Refining Co.*, 915 F.2d at 1450, 1454 (layoffs occurred as part of predecessor's bankruptcy, and three workers retired after being told they would receive greater pensions if they did so, in lieu of layoff); *Stewart Granite Enterprises*, 255 NLRB 569, 570 (1981) (employees were laid off or transferred to other facilities in preparation for the disposition of manufacturing plant); *Nephi Rubber Production Corp.*, 303 NLRB 151 (1991) (employees laid off, and plant shuttered, 2 months before predecessor filed for bankruptcy reorganization). However, it is undisputed that each employee had been represented by the incumbent union at the predecessor.

[29] My research has found no case where employees, who were never represented by the incumbent union at the predecessor, were counted as part of a successorship majority. And no party has cited any such case.

[30] The record shows that the stagehands hired by Wynn on May 1 were never referred by Labor Plus to work at the Encore Theater after they were hired by Wynn. Thus they were not employed by Labor Plus in the unit as of the

election and the date upon which the bargaining obligation between Labor Plus and the Union commenced, should be counted for purposes of determining a successorship majority.[31]

1. David Weigant should not be counted toward a successorship majority.

During the representation proceeding the hearing officer, affirmed by the Regional Director, found that steady-extra David Weigant was eligible to vote because the testimony as to whether Weigant was hired by Wynn on May 1 was too unreliable to be credited. In this matter, however, whatever previous deficiencies that existed in the representational proceeding regarding Weigant's hire date were resolved by the stipulation of facts introduced into evidence by the General Counsel, and signed by all the parties.[32] (JX. 20; Tr. 9) The parties stipulated that Weigant was hired by Wynn on May 1.[33] As such, Weigant was not an employee of Labor Plus in the certified unit as of the May 2 election, and Labor Plus never had an obligation to bargain with the Union over Weigant's terms and conditions of employment.[34] Accordingly, Weigant will not be counted for purposes of determining whether a bargaining obligation existed based upon Wynn hiring a majority of former Labor Plus employees.

D. Wynn did not hire a majority of former Labor Plus employees

As discussed above, the stagehands hired by Wynn on May 1 will not be counted in determining whether a successorship majority exists, as they were not employed by Labor Plus at the Encore Theater as of the date of the election, and there was no bargaining obligation between Labor Plus and the Union regarding those workers. The hiring timeline, set forth in Appendix A, shows that, as of June 16, when Wynn had hired a "substantial and representative complement" of its work force, it employed 20 stagehands at the Encore Theater. Of those 20, 10 were former unit employees of Labor Plus. "In a tie the union loses for want of a majority." *C.J. Krehbiel*

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election date, and Labor Plus never had an obligation to bargain with the Union over the terms of employment of those workers. (Tr. 79; GC. 21(d)-(j); JX. 11)

[31] Such an approach also comports with the Board's general precedent regarding voter eligibility. The Board has long held that an employee is eligible to vote in a representation election if they were employed in the bargaining unit during the determined eligibility period, and on the date of the election. *Angotti Health Systems, Inc.*, 346 NLRB 1311, 1315 (2006); *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, 1444 (9th Cir. 1983).

[32] It is the Board's general rule, based upon the principle of res judicata, that a respondent is not entitled to relitigate in a subsequent refusal-to-bargain proceeding representation issues that were or could have been litigated in the prior representation proceeding. *Westwood One Broadcasting Services*, 323 NLRB 1002, 1002 (1997) (citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); *Board's Rules and Regulations* §102.67(g); *see also*, *UFCW, Local 576 v. NLRB*, 675 F.2d 346, 353 fn. 7 (D.C. Cir. 1982). Here, however, it was the General Counsel that introduced the stipulation of facts into evidence, and there was no objection by any party, including the Union, which entered into the stipulation. Moreover, where new and relevant information is introduced in a subsequent unfair labor practice proceeding, and where the previous representation determination is based upon an incomplete record, a more flexible approach is warranted to correct "fundamental errors in the disposition of a case." *Burns Electronic Security Services, Inc., v. NLRB,* 624 F.2d 403, 408–410 (1980); *Burns Electronic Security Services, Inc*., 256 NLRB 860 (1981). Such is the case here.

[33] Stipulations of facts voluntarily entered into by the parties are binding on both trial and appellate courts. *FDIC v. St. Paul Fire & Marine Ins. Co.*, 942 F.2d 1032, 1038 (6th Cir. 1991); *Accord, Vallejos v. C. E. Glass Co.*, 583 F.2d 507, 510 (10th Cir. 1978) ("As a general rule, a stipulation is a judicial admission binding on the parties making it, absent special considerations.").

[34] Indeed, the evidence shows that Weigant did not work for Labor Plus at the Encore Theater at any time from April 28 until Labor Plus stopped referring stagehands on May 9. (GC. 21)

Co. v. NLRB, 844 F.2d 880, 884 (D.C. Cir. 1988); *see also, Bauer-Schweitzer Hop & Malt Co.*, 79 NLRB 453, 454 (1948) (in the case of a tie vote, no party has received a majority of the votes cast); *Indiana Bridge Co., Inc.*, 57 NLRB 681, 682 (1944) (where election results in a tie vote, no majority bargaining representative was designated). As such, no bargaining obligation attached for Wynn. Because the complaint allegations are all premised upon Wynn acquiring a successorship bargaining obligation, I find that Wynn did not violate Section 8(a)(1) and (5) as alleged, and I recommend the complaint be dismissed in its entirety.

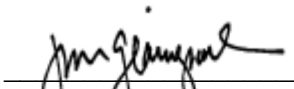
Conclusions of Law

The General Counsel failed to prove that Respondent Wynn violated Section 8(a)(5) and (1) as alleged in the complaint. On these findings of fact, conclusions of law, and based upon the entire record, I issue the following recommended[35]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 16, 2017



John T. Giannopoulos
Administrative Law Judge

[35] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX A

Encore Theater Stagehands
Hired by Wynn[1]

Name	Status	Date hired by Wynn	Former Labor Plus Employee	Eligible to Vote in Election	Employed by Labor Plus on 5/2/15	Employed by Wynn on 6/16/15	% Wynn stagehands that worked for Labor Plus on 5/2/15
Oliver, Lynsey[2]	Full Time	4/15/2015				1	0 %
Clark, Ben	Full Time	4/15/2015				2	0 %
Bober, Gregory[3]	Full Time	4/15/2015				3	0 %
Lewis, Heather	Full Time	5/1/2015	1			4	0 %
Contini, Jonathan[4]	Full Time	5/1/2015	2			5	0 %
Herlihy, James[5]	Full Time	5/1/2015	3			6	0 %
Stephenson, William	Full Time	5/1/2015	4			7	0 %
Weigant, David	Steady Extra	5/1/2015	5	1		8	0 %
Portzer, Brett	Full Time	5/5/2015	6	2	1	9	11 %
Jensen-Miller, Deborah	Full Time	5/5/2015	7	3	2	10	20 %
Fouts, Eric	Full Time	5/5/2015	8	4	3	11	27 %
Meyers, Eric	Full Time	5/5/2015	9	5	4	12	33 %
Shafer, Eric	Full Time	5/5/2015	10	6	5	13	38 %
Barnes, Collin[6]	Steady Extra	5/5/2015	11	7	6	14	43 %
White, Matthew[7]	Steady Extra	5/6/2015	12			15	40 %
Cresson, Luke	Full Time	5/8/2015	13	8	7	16	44 %
Zobrist, Kendall	Full Time	5/11/2015	14	9	8	17	47 %
Todaro, Anthony[8]	Steady Extra	5/19/2015					44 %
McMillon, Joel[9]	Full Time	6/2/2015				18	44 %
Perrill, Joshua	Full Time	6/16/2015	15	10	9	19	47 %
Karlsen, Timothy[10]	Steady Extra	6/16/2015	16	11	10	20	50 %
Bonanno, Robert[11]	Steady Extra	8/4/2015					48 %
Yorty, Ryan[12]	Steady Extra	8/4/2015					45 %
McNulty, Bryan	Steady Extra	8/4/2015					43 %
Lemon, Samantha[13]	Full Time	10/13/2015					41 %
Webb, Jason	Full Time	11/24/2015					41 %
Anderson, Matthew	Steady Extra	3/22/2016					45 %
Igou, Christopher	Steady Extra	3/22/2016					43 %
Stransky, Jordin	Full Time	5/24/2016					45 %
Rogerson, Brian	Steady Extra	5/31/2016					40 %
Tulli, Brandon	Full Time	6/7/2016					38 %
Backus, Cameron	Full Time	6/21/2016					36 %
Laurent, Gary	Full Time	7/12/2016					36 %
Bevacqua, Andrew	Steady Extra	10/4/2016					36 %

[1] See GX. 20; JX. 11; JX. 24.
[2] Oliver transferred to a different department on August 6, 2015. (GX. 20 ¶23)
[3] Bober's employment ended on February 14, 2016. (GX. 20 ¶23)
[4] Contini's employment ended on April 12, 2016. (GX. 20 ¶24)
[5] Herlihy's employment ended on May 3, 2016. (GX. 20 ¶24)
[6] Barnes' employment ended on August 23, 2015. (GC. 20 ¶26)
[7] White's employment ended on August 26, 2016 (GX. 20 ¶27)
[8] Todaro's employment ended on May 26, 2015 (GX. 20 ¶30)
[9] McMillon's employment ended on January 23, 2016. (GX. 20 ¶31)
[10] Karlsen's employment ended on May 26, 2016. (GX. 20 ¶32)
[11] Bonanno's employment ended on October 31, 2015. (GX. 20 ¶33)
[12] Yorty's employment ended on February 14, 2016. (GX. 20 ¶33)
[13] Lemon's employment ended on June 26, 2016. (GX. 20 ¶34)